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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1100

UNITED STATES OF AMERICA, Appellant

v.

LIONEL PALLETZ

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENT TO PETITION FOR RECONSIDERATION OF THE COURT'S ORDER OF APRIL 7, 1947, REVERSING THE JUDGMENT OF THE DISTRICT COURT, AND FOR ALLOWANCE OF HEARING OF APPEAL.

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The appellee submits the following supplemental reasons in support of his motion that the court reconsider its per curiam order of April 7, 1947, reversing the judgment of the District Court, and his motion that this Court grant appellee a hearing in the above captioned appeal and opportunity to appellee to submit brief and oral argument on appeal:

1. The appeal of the United States was not filed within the time prescribed by statute and this fact is plain upon the record.

Statement as to Jurisdiction, filed by appellant, concedes that "The district court, *in an order entered December 27, 1946*, granted the motion to dismiss" (p. 4, italics

supplied). The record as designated on appeal contains a copy of this order, and a copy of appellant's Notice of Appeal which was *filed in the district court on January 27, 1947.*

The jurisdiction of this court on direct appeal of the judgment of the district court is conferred by the Act of March 3, 1911, 36 Stat. 1167, as amended by the Act of May 9, 1942, 56 Stat. 271, (18 U. S. C. A. § 682 Supp.) which provides that

> "The appeal in all such cases *shall be taken within thirty days after the decision or judgment has been rendered* . . . Rules of practice and procedure with respect to appeals authorized by this section shall be prescribed by the Supreme Court of the United States . . ." (Italics supplied)

The order of this court of December 30, 1944, reported in 323 U. S. 824, which is in full force and effect, reads as follows:

Criminal Appeals Rules
Order

> It is ordered that the following rule regulating criminal appeals by the United States be prescribed, pursuant to the Act of May 9, 1942, 56 Stat. 271:
>
> [illegible]s of criminal procedure after plea of guilty, or verdict or finding of guilt, promulgated from time to time pursuant to the Act of February 24, 1933, c. 119 (47 Stat. 904) as amended, shall be applicable to appeals by the United States under the Act of May 9, 1942, c. 295, sec. 1 (56 Stat. 271), 18 U. S. C. 682, *except that the time for taking such appeals shall be as prescribed by the said Act of May 9, 1942.*" (Italics supplied)

Rule 45 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21,

1946, providing rules for computation of time, is inapplicable for two reasons:

(a) Subdivision (a) of Rule 45, as appears from the Notes to the Rules, prepared by the Advisory Committee, supersedes the method of computing time prescribed by Rule 13 of the Criminal Appeals Rules, promulgated on May 7, 1934, 292 U. S. 661. The Criminal Appeals Rules were expressly held inapplicable to the time for taking appeals under the Act of May 9, 1942, by this court's order of December 30, 1944, quoted above.

(b) Even had the court not expressly recognized in its order that the time for taking such appeals should be as prescribed by the said Act of May 9, 1942, the power of the court to prescribe rules of practice and procedure does not include the power to enlarge or extend the period within which an appeal authorized by the Criminal Appeals Act may be taken. *U. S. v. Hark*, 320 U. S. 531 (1944).

Appellant's notice of appeal was filed after the expiration of the thirty days allowed by the statute for the taking of an appeal under the Criminal Appeals Act and therefore the appeal must be dismissed.

2. On the merits, the judgment of the district court should be sustained.

(a) The information charged violation of the Emergency Price Control Act of 1942, as amended, and Regulations of the Price Administrator issued pursuant thereto.

By its own limitation the Emergency Price Control Act of 1942, as amended, and all regulations thereunder, expired on June 30, 1946.

The Information was not filed until August 29, 1946, and consequently this prosecution was not commenced until after expiration of the Act and Regulations under which violations are charged.

The offenses charged in the information arise from transactions between appellee and each of five tenants of

an apartment house in Philadelphia of which appellee was lessor. The transactions are alleged to have occurred between July 1, 1944 and May 1, 1945, and involve the aggregate amount of $345.

Appellee, by motion to dismiss, raised the question whether a prosecution could be commenced after the expiration of the Emergency Price Control Act of 1942 as amended. In other words, did not the saving clause, section 1(b) of that Act (50 USCA App. sec. 901 Supp.) apply only to prosecutions commenced prior to the expiration date of said Act?

After full argument, and upon consideration of extensive briefs submitted by the parties, the district court dismissed the information and appellant appealed from the court's order dismissing the information.

(b) The prosecution was not saved unless sec. 1(b) of the Emergency Price Control Act of 1942 (50 USCA App. Sec. 901 Supp.) operated to save it.

The Act expired by its own provisions on June 30, 1946. The effect of expiration of a temporary criminal statute is the same as repeal of a criminal statute. See Revised Stat. 13, as amended. And it is clear that upon repeal of such an Act without a saving clause, there can be no post-repeal prosecution or punishment for its violation. Even where a proceeding is pending, it cannot be further prosecuted, even if there has been a plea of guilty, and if the statute is repealed after conviction, judgment must be arrested and if appeal from conviction is pending when the statute is repealed the judgment of conviction must be set aside and the indictment quashed. 1 Wharton Criminal Law (1936) §§ 42, 414. This rule has often been affirmed by this Court. *U. S. v. Reisinger*, 128 U. S. 398 (1888); *U. S. v. Hark*, 320 U. S. 531 (1944).

The general saving statute (R. S. § 13) which since the amendment of 1944 expressly applies to expired temporary statutes as well as repealed statutes (1 USCA § 29 Supp.) has no application to the Emergency Price Control

Act of 1942, as amended, since the former expressly provides that the expiration of a temporary statute shall not have the effect to release or extinguish such statute "unless the temporary statute shall so expressly provide."

Sec. 1(b) of the Emergency Price Control Act of 1942, as amended (50 USCA § 901 Supp.) contains specific provision as follows:

> "§ 901. Purposes; time limit; applicability
>
> "(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1946, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of *sustaining* any proper suit, action, or prosecution with respect to any such right, liability, or offense. As amended June 30, 1945, c. 214, § 1, 59 Stat. 306." (Italics supplied)

The plain effect of the language of the general saving clause is to remove from the applicability of the Act any statutes which themselves contain a saving clause. Since the Emergency Price Control Act contains an express provision as to the effect of expiration, this express provision supersedes and supplants the general statute.

Hence the Emergency Price Control Act alone determines what effect its expiration has upon this prosecution. If Sec. 1(b) as amended does not save the prosecution then the common-law rule controls and the prosecution must fall.

Section 1(b) does not operate to save a prosecution not commenced prior to June 30, 1946. Pertinent words of the saving clause stripped of phrases not referring to criminal provisions of the statute read as follows:

> ". . . except as to offenses committed . . . prior to such termination date, the provisions of the Act . . . shall be treated as still remaining in force for the purpose of sustaining any proper . . . prosecution, with respect to any such . . . offense."

The question becomes one of interpretation of the crucial word "sustaining" in the phrase "sustaining any proper prosecution". Unless "sustaining" may properly be read as synonymous with "commencing" the Government's information must fall. In *George v. Connecticut Fire Insurance Company*, 201 Pac. 410 (Okla. 1921), the court construed the expression "no action (under a fire insurance policy) shall be sustainable" in the absence of specified conditions and, finding that the usual sense of sustain is to "carry on" or "maintain", refused to read it in the sense of "commenced".

In general, "sustain" and "maintain" carry the same meaning. Thus in *Carson Rand Co. v. Stern*, 31 S. W. 772 (Mo. 1895) it was held that the word "maintain" signifies literally to hold by the hand, hence in ordinary use "to uphold, to sustain, to keep up" while in pleading it is defined to mean to support what has already been brought into existence. The Court said:

> "There is a well-defined distinction between beginning and maintaining an action, viewed with reference to the facts of the controversy now before us [interpreting an act preventing foreign corporations from maintaining any suit or action before compliance with the statute]. We are bound to assume that the word 'maintain' was chosen to express the exact shade of meaning intended by the lawmakers. It does not, with its present context, seem to us to include also the word 'begin' ".

This language would apply with equal force to the word "sustain" which could have been substituted in the statute without altering its meaning.

In *Roullard v. Gray*, 175 Pac. 479 (Cal. App. 1918) it was held that to "maintain" an action is not the same as to commence it but implies that the action had already been commenced. See *Smallwood v. Gallardo*, 275 U. S. 56 (1927).

Webster's basic definition of sustain is "to maintain or give support, to cause to continue in existence". Words appearing in criminal statutes must be given their ordinary accepted meaning and where two opposing interpretations are possible the interpretation favorable to defendant must be taken. 1 Wharton Criminal Law Sec. 414.

In *U. S. v. Hark*, 320 U. S. 531 (1944) this court upheld a prosecution brought under the Emergency Price Control Act after revocation of the Maximum Price Regulation which the indictment alleged had been violated. The court pointed out that revocation of the regulation did not repeal the statute, citing *U. S. v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). In the latter case, Mr. Justice Sutherland after holding that revocation of a proclamation issued under authority of a joint resolution of Congress did not put an end to the law, stated

> "We should have had a different case if the joint resolution had expired by its own terms upon the issue of the second proclamation"

and cited with approval language of the New Hampshire court to the effect that when laws expire by their own limitation they cease to be law in relation to the past as well as the future and can no longer be enforced in any case.

(c) Congress in enacting Sec. 1(b) did not intend to save all future prosecutions but clearly intended to save pending prosecutions only. Under the common law prior to R. S. § 13 a prosecution under a criminal statute pending on the date of repeal of the statute would fall. To alter this sweeping effect of the common law rule Congress en-

acted R. S. § 13 to continue in force after repeal (or in the case of a temporary statute, after its expiration) any statute "for the purpose of sustaining any proper . . . prosecution" to enforce a penalty incurred under such statute. The plain effect of this section is that a prosecution pending on the date of repeal would be allowed to continue to final judgment and sentence. What is there in the language of the statute to even suggest, much less to establish with the certainty required of criminal statutes, that the general saving act was intended to go so much farther and encompass prosecutions not *commenced*, until after repeal of the criminal statute under which prosecution is sought to be brought? Had Congress intended to so greatly broaden existing law apt words could have readily been used for that purpose. See 21 N. Y. Consol. Laws. Sec. 93; 46 Purdon's Penna. Stat. Sec. 596.

When Sec. 1(b) was drafted the phrase "for the purpose of sustaining any proper . . . prosecutions" was borrowed from R. S. 13. These words should be interpreted no more broadly here and nothing appears to indicate an intention by Congress to broaden their import. Regardless of intent, the words appear in a criminal statute where they must be interpreted in accordance with the rule of strict construction applicable in criminal matters, with all doubts resolved in favor of the accused.

3. The petitioner is not the appellant, that is to say, this is not an instance where certiorari has been denied or where an appeal, after certiorari allowed, has been decided against *appellant* without hearing. On the contrary, this appeal was taken by the Government from a judgment in favor of the accused (petitioner-appellee) in a criminal proceeding and this court's order, reversing the judgment of the district court, sustains the appeal and is a decision against the accused without affording the accused a hearing or the right to contest the appeal.

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